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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

AMUSEMENT AND MUSIC OPERATORS ASSOCIATION,
Petitioner,

v.

COPYRIGHT ROYALTY TRIBUNAL,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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September 17, 1982

QUESTION PRESENTED

Whether the Court of Appeals properly affirmed a decision of the Copyright Royalty Tribunal as supported by substantial evidence and not arbitrary or capricious?

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STATEMENT OF THE CASE

Introduction

This case concerns the copyright license fee paid by operators of coin-operated phonorecord players, commonly known as "jukeboxes," for the commercial performance of musical works. A group of commercial jukebox operators, represented by their trade association, would prefer to pay a lower fee than the royalty found to be reasonable by the Copyright Royalty Tribunal, the federal administrative agency charged with setting the rate. The operators' writ of certiorari asks this Court to review a unanimous decision of the United States Court of Appeals for the Seventh Circuit affirming the agency's decision in all respect.

For decades jukebox operators escaped any liability for the public performance of copyrighted music due to a special exemption contained in the Copyright Act of 1909. 17 U.S.C. § 1(e) (1976) (repealed). The Copyright Revision

Act of 1976, 17 U.S.C. § 101, *et seq.*, finally removed this exemption and permitted music writers and publishers compensation for use of their works by the jukebox industry.[1] The vehicle for acquisition of performance rights over jukeboxes is the compulsory license. 17 U.S.C. § 116(a)(2). Congress established an initial compulsory license fee of $8.00 per jukebox per year, to commence in 1978. However, it noted expressly that this rate reflected a political compromise adopted in 1967. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 113, 115 (1976); S. Rep. No. 473, 94th Cong., 1st Sess. 96-97 (1975). Therefore, Congress required the Copyright Royalty Tribunal, an administrative agency created under the 1976 Act, to reexamine the rate in 1980, 17 U.S.C. § 804(a)(1), in accordance with specified guidelines. 17 U.S.C. § 801(b)(1)(A)-(D).

Pursuant to the statutory requirements, the Tribunal, in January, 1980, commenced rulemaking proceedings and held evidentiary hearings. On January 5, 1981, the Tribunal issued a detailed decision concluding that application of the statutory criteria required a license fee of $50.00 per jukebox per year. The Tribunal found that the fee should be phased-in, starting at $25.00 for 1982 and 1983, then $50.00 for the years 1984 through 1986. The Tribunal also determined that the $50.00 fee should be adjusted in 1987 to reflect changes in the Consumer Price Index. (App. 57.)

On April 16, 1982, the United States Court of Appeals for the Seventh Circuit affirmed the Tribunal's decision in all respect. (App. 1.)

The Parties

Petitioner Amusment and Music Operators Association ("AMOA") is a trade association of operators, manufacturers,

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[1] The relevant provisions of the Copyright Revision Act of 1976 are reprinted in the appendix to the Amusement and Music Operators Association petition at pp. 64-66. References to the AMOA appendix are given by the designation "App." followed by the appropriate page numbers, *e.g.*, (App. 64-66). The decision of the Court below is reprinted in the appendix. (App. 1-32.) The decision of the Tribunal is also reprinted in the AMOA appendix. (App. 35-63.)

and distributors of jukeboxes and other coin-operated amusement devices. The Copyright Royalty Tribunal is a federal administrative agency which Congress established in 1976 "to make determinations concerning the adjustment of reasonable copyright rates." 17 U.S.C. § 801(b)(1). Respondents Broadcast Music, Inc. ("BMI") and American Society of Composers, Authors and Publishers ("ASCAP") are music performing rights societies, organizations that license the public performance of non-dramatic musical works on behalf of the copyright owners. The Act provides specifically that the royalty fees are to be distributed to the performing rights organizations. 17 U.S.C. § 116(c)(4)(B).

Statutory Background

By statutory exemption, jukebox operators for nearly seventy years were not required to compensate writers and publishers for the commerical performance of their copyrighted musical works. The Copyright Revision Act of 1976, 17 U.S.C. § 101, *et seq.*, eliminated this exemption and established a mechanism to compensate music copyright owners for the public performance of their works by jukebox operators. Under the Act, jukebox operators must secure a compulsory license by filing annually an application with the Register of Copyrights and depositing the required license fee for each jukebox. 17 U.S.C. § 116(b)(1). These fees are then distributed (after deduction of administrative expenses) to the performing rights organizations (or to copyright owners not affiliated with performing rights organizations). 17 U.S.C. § 116(c).

Congress adopted an initial license fee of $8.00 per jukebox per year and required payment beginning in 1978. The $8.00 fee level, "represents a compromise figure adopted in 1967, and, as a compromise, it is acceptable as the rate to be specified in Section 116 . . . [The House Judiciary] Committee has accepted the $8 jukebox royalty in the expectation that it would subject to periodic review." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 113, 115 (1976). The Senate report was in accord:

> [T]he Committee has been greatly influenced by the desire to conform to the rate provided in the copy-

> right legislation passed by the House of Representatives during the 90th Congress. Therefore, although a higher rate would be warranted, the Committee has endeavored to facilitate the progress of this legislation by preserving to the extent possible in view of other provisions of this bill, the rate adopted by the House of Representatives.

S. Rep. No. 473, 94th Cong., 1st Sess. 96-97 (1975).

The Act also established the Copyright Royalty Tribunal as the administrative agency "to make determinations concerning the adjustment of reasonable copyright royalty rates as provided in [Section] . . . 116." 17 U.S.C. § 801(b)(1). The Tribunal was directed to adopt a rate "calculated to achieve" several specified objectives. 17 U.S.C. §§ 801(b)(1)(A)-(D). Because the Congressional committees disavowed expressly any notion that the $8.00 fee was reasonable or calculated to achieve the goals of Section 801(b), Congress required the Tribunal to undertake a complete review of the rate in 1980, only two years after the compromise rate became effective. 17 U.S.C. §§ 804(a)(1). In addition to the mandatory 1980 review, the Act provides that adjustment proceedings may be held upon petition by any person having a significant interest in the outcome "in 1990 and in each subsequent tenth calendar year." 17 U.S.C. § 804(a)(2)(C).

Tribunal Proceedings

In accordance with the statute, the Tribunal initiated the royalty adjustment proceeding in January, 1980 by publication of a notice of rulemaking in the *Federal Register*. (45 *Fed. Reg.* 62, March 28, 1980.) Full evidentiary hearings were conducted, during which both direct and rebuttal cases were heard.

It was AMOA's position that the royalty rate should be frozen at the $8.00 compromise figure. (App. 44.) AMOA offered, as the centerpiece of its case, its own survey of the jukebox industry purporting to show that the industry was facing difficult financial circumstances. (App. 42.) AMOA also offered its own standard for analysis of proposals to

increase the rate: an increase could be justified only after rates of return were calculated for "individual musical works based on [a comparison of] the time and expense incurred by the songwriters for each one, together with a value inexplicably derived from the placement of a work on a popularity chart." (App. 48-49.) As a first step in acquiring this data, AMOA sought an investigation of royalty distributions to the individual members and affiliates of each of the performing rights organizations. *Id.*[2]

In applying the statutory criteria, the Tribunal discounted the AMOA economic survey, in part because the record raised "significant questions as to the survey's methodology and objectivity, as well as the nature and scope of the data provided." (App. 51.) Significantly, results of the survey differed sharply from independent surveys undertaken by two separate jukebox industry trade publications. Based on the data gathered in these independent surveys, the Tribunal concluded that "it would be reasonable for some operators to be paying more than $50.00," especially if "a fee schedule based on such factors as per box revenue or the number of boxes owned by a particular operator" was adopted. (App. 53.) Moreover, anecdotal evidence offered by industry spokesmen did "not provide a basis for forming any representative picture of the jukebox industry nor [did] it create a foundation for the industry's claim of economic hardship." (App. 52.) Nevertheless, according to the Tribunal, the record did establish that "some jukebox operators function on a narrow profit margin, and that certain jukeboxes produce modest revenues." (App. 53.) In accordance with the statutory objectives "to afford the copyright user a fair income," contained in Section 801(b)(1)(B), and "to minimize any disruptive impact on the structure of the industries," contained in Section 801(b)(1)(D), the Tribunal factored these findings into its rate determination. (App. 55.)

[2] In the petition, it is claimed that AMOA sought only an analysis of the "collective costs and financial condition" of music writers. (AMOA petition at p. 5.) In fact, AMOA sought below an investigation of *all* payments made to individual composers and an analysis of the "cost" of producing a particular composition. Thereafter, AMOA would urge the Tribunal to calculate a "rate of return" based on the "values" of *individual* compositions as reflected in industry trade charts.

However, the Tribunal rejected AMOA's contention that the objective "afford[ing] the copyright owner a fair return," specified in Section 801(b)(1)(B), required the calculation of rates of return for each individual piece of music. The Tribunal found that this objective "reflect[ed] the broad goal of the legislation to insure that creators are fairly compensated through adoption of license fees establishing a reasonable value for the use of Copyright works." (App. 49.) In view of specific provisions in the Act authorizing distribution of royalty fees to the performing rights organizations, the Tribunal concluded that the criterion "is not a directive authorizing the Tribunal to investigate individual member's or affiliate's collections from the performing rights organizations." *Id.*

Other evidence did shed light on the "fair return" to the copyright owner. Expert economic testimony suggested that the statutory objectives would be met if the Tribunal modeled the jukebox license fee after royalty fees paid for analogous public performance rights. (App. 37-38). Evidence was submitted demonstrating that restaurants, bars and other establishments of the type likely to employ jukeboxes paid royalty rates of at least $140 per year for performance of musical works utilizing tape recorders, record players and jukeboxes not subject to compulsory license. (App. 39.) The evidence also showed that jukebox royalty fees in nineteen foreign countries averaged approximately $96.00 per box annually. (App. 40.)

In its decision, the Tribunal acknowledged the relevancy of these marketplace analogies to its analysis. However, it recognized that its rate determination must be founded in application of the statutory guidelines and "cannot be directly linked to marketplace parallels." (App. 52-53). Noting that the analogies suggested were "subject to limitations and distinguishing features," the Tribunal concluded that this evidence must "be weighed together with the entire record and the statutory criteria." *Id.* Viewed in this light, the Tribunal found that marketplace parallels could serve as an appropriate "benchmark" in setting the reasonable rate. (App. 53.) In the final analysis, the Tribunal reasoned that the statutory objectives would be achieved by tailoring rates suggested by marketplace analogies to reflect their distinguishing features and to ac-

commodate the economic requirements of small or marginal operators. (App. 53.)

Thus, the royalty rate adopted by the Tribunal was substantially lower than the analogous license fees and was to be phased-in and later adjusted for a change in the cost of living. The Tribunal concluded that the cost of living adjustment was consistent with the legislative history of the Act and required in this case in order to insure continuing compliance with the statutory criteria throughout the decade. (App. 54.)

The Tribunal also found that the increased rate would meet the additional statutory criteria. It would "encourage[ ] . . . creation by songwriters and exploitation by music publishers, and so maximize availability of works to the public" pursuant to Section 801(b)(1)(A). *Id.* Furthermore, applying Section 801(b)(1)(C), no basis was found for concluding that jukebox owners make any distinctive contribution to the opening of new markets. Therefore, the Tribunal concluded that the equities weighed in favor of higher renumeration to copyright owners. (App. 55-56.)

Appellate Court Review Proceedings

AMOA and ASCAP each filed Petitions for Review of the Tribunal's decision in the United States Court of Appeals for the Seventh Circuit.[3] SESAC did not appear as a party in the Court of Appeals.

AMOA challenged the Tribunal's decision on several grounds, three of which were reasserted in its petition for writ. First, AMOA challenged the use of the marketplace analogies as a factor in the rate determination arguing that "the allegedly analogous fees in each situation were established under the protection of government-granted monopoly rights (which exist presumably in the form of copyright protection) rather than

[3] ASCAP argued that the $50.00 fee was outside of the "zone of reasonableness" suggested by the marketplace analogies and that the lowest reasonable rate was $70.00. BMI appeared as a party-respondent supporting the rule as against the AMOA challenge, but took no position as to ASCAP's contentions.

in a free competitive market." (App. 26.) Second, AMOA argued that the Tribunal erred in refusing, for the purpose of assessing a "fair return," to adopt its complex methodology requiring calculation of time and expenses incurred by songwriters, in the creation of individual musical works, assignment of values to the individual works based on popularity charts and comparisons of this information with data culled from the records of the performing rights organizations concerning payments for individual songs.[4] (App. 29-30.) Third, AMOA contended that the Tribunal's decision to include a cost of living adjustment in the royalty rates violated the Act. (App. 22-23.)

The Court rejected AMOA's contentions and affirmed the Tribunal's decision as "fully supported by substantial evidence" (App. 27), and "lawful in all respects." (App. 2.)

First, the Court held that "the Tribunal could properly take cognizance of the marketplace analogies while appraising them to reflect the differences in both the respective markets (*e.g.*, with respect to volume and industry structure) and the regulatory environment." (App. 26.) The Court pointed out that "it is quite appropriate and normal in this administrative rate determination process to find distinguishing features among various analogous situations affecting the weight and appropriate thrust of evidence rather than its admissability." *Id.* The Court also noted that the marketplace analogies "presented the most credible and relevant evidence before the Tribunal." (App. 26-27.) Second, the Court held that the Tribunal properly declined to adopt AMOA's methodology for assessing a "fair return" because "the inquiries sought by AMOA into the internal distribution processes of the performing rights societies are irrelevant to the purposes of the Act." (App. 30.) Thus, "it would be not only improper but also impossible to attempt to provide each copyright owner with an appropriate return on his or her 'investment' in copyrighted material." *Id.* Third, the Tribunal held that a cost of living adjustment "designed to maintain the real value of the fee set by the Tribunal is not prohibited but is instead affirmatively

[4] *See* footnote 2, *supra*.

supported by the language of the Act." (App. 22.) The Court found that "both the phase-in mechanism and the inflation adjustment, which cut in opposite directions," were consistent with the broad statutory criteria and "demonstrate a flexibility with which Congress intended to endow the Tribunal in making its determinations." *Id.* The Court concluded, based on a review of the record, that "the addition of an automatic inflation factor was necessary to achieve the goal of the Act." (App. 32.)

In summary, the Court held that "the Tribunal did not act either unreasonably or unlawfully by establishing a $50.00 royalty fee which would be implemented in stages and subject to future inflationary adjustments." (App. 31.)

REASONS WHY THE WRIT SHOULD BE DENIED

This case involves a routine exercise of discretion by an expert federal agency – the establishment of a reasonable rate supported by substantial evidence. The Copyright Royalty Tribunal has set such a reasonable rate for music performances over commercial jukeboxes. Its decision has been sustained by the Court of Appeals. The rate established may not be to AMOA's liking; however, that alone hardly merits issuance of a writ.

This Court has established guidelines for the consideration of a petition for a writ. *See* 28 U.S.C. §17. A writ of certiorari is not issued as a matter of right and is granted only in special circumstances. The AMOA petition fails to explain why the questions it has raised achieve such status and require the special attention of this Court. Indeed, Rule 17 escapes mention entirely in the AMOA petition.

As will be shown, no important question of federal law has been decided by the court below. Nor does the decision of the court below conflict with decisions of other circuits or of this Court.

I. The Decision Below Does Not Involve A Question of Federal Law Sufficiently Important to Merit Review by this Court

The AMOA petition requests further review of the Tribunal's determination of a royalty rate to be paid by commercial jukebox operators for the public performance of music. The issues raised relate solely to Section 116 of the Copyright Revision Act of 1976, 17 U.S.C. § 116, which addresses jukebox rate determinations. The issues raised do not bear on any of the Tribunal's other responsibilities under the Act; nor do they affect the application of copyright principles generally. This section is relevant only to music composers and publishers, represented by the performing rights organizations, and the commercial jukebox operators. By the terms of the statute itself there are no other potential litigants which would benefit from this Court's review.

Not only are the issues raised by the AMOA petition applicable only to this specific proceeding, the questions presented are exceedingly narrow. AMOA does not challenge the application of a compulsory license to jukebox performances. Nor does it challenge the authority of the Tribunal to review the royalty rate schedule. Instead, AMOA questions only whether the Tribunal has properly interpreted and given sufficient weight to specific facts in reaching its decision. AMOA suggests improperly that the Tribunal does not have the flexibility and discretion normally associated with administrative ratemaking under historic statutory and case precedent.

The real question of law raised by AMOA already has been settled by this Court: what are the limits of agency discretion in rate determinations? This Court has established the standard in *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968). Thus, courts are without authority to set aside a particular rate determination if it lies within a "zone of reasonableness," 390 U.S. at 767, and reflects "reasoned consideration of each of the pertinent factors," *Id.* at 792.

Ignoring such criteria, AMOA presents three arguments. First, it argues that the court below erred in sustaining the

Tribunal's decision to employ marketplace analogies in deriving a reasonable rate. Second, AMOA asserts that the court below should have required the Tribunal to have calculated a "fair return" for individual music writers. AMOA proposes a complex costing methodology involving an assessment of costs incurred by song writers in creating musical works and an investigation of distribution methods employed by the performing rights organizations. Third, AMOA asserts that the court below erred in approving the Tribunal's consideration of prospective economic conditions through adoption of a rate schedule which includes an automatic, one-time inflation adjustment. Thus, AMOA argues that the Tribunal *must*, by law, reject evidence concerning marketplace analogies and inflationary trends and accept evidence concerning the costs incurred by music writers and the distribution methods employed by the performing rights organizations. However, as *Permian Basin* instructs, the Tribunal is not so limited. The statutory guidelines give the Tribunal a broad focus, requiring that it take into account the requirements of copyright owners, copyright users and the general public. The Tribunal is not confined to consideration of specific types of evidence in the application of these broad guidelines.

Thus, the Tribunal's consideration of marketplace analogies, as one factor in establishing the rate, falls properly within the realm of its discretion. The Tribunal chose to utilize these analogies only as benchmarks, noting differences in the respective marketplace and the regulatory environments. Therefore, there is no basis for AMOA's claim that the Tribunal placed "complete reliance" on the analogies and ignored the statutory guidelines. In fact, the Tribunal departed substantially from the royalty rate applied in the analogous markets in order to adopt a rate which would accommodate the economic requirements of the jukebox industry.

The Tribunal also was well within its discretion rejecting AMOA's complex methodology for calculating an individual music writer's rate of return. There is no indication in either Section 116 or its legislative history of a requirement that the Tribunal must undertake the cost analysis suggested by AMOA. Rather, the statutory guideline cited by AMOA – "to

afford the copyright owner a fair return for his creative work" – reflects the broad goal of the legislation to insure that creators are fairly compensated through license fees. The Tribunal found the AMOA approach to be "inexplicable." The Court of Appeals concluded that it was both "impossible" and "improper." In any event, this is clearly not an issue of any public consequence or moment.

Neither does the inflation adjustment raise a question meriting this Court's attention. Section 801(b)(1) directs the Tribunal "to make determinations concerning the adjustment of reasonable copyright royalty rates." 17 U.S.C. §801(a)(1). Nothing in this language precludes the Tribunal from ordering such an adjustment in order to maintain the real value of the rate. On the contrary, precedent supports such Tribunal action. As stated by the District of Columbia Court of Appeals in its review of the Tribunal's decision concerning a new compulsory license fee for the mechanical reproduction of copyrighted works:

> We do not suggest that the Tribunal must set a flat rate that will remain in effect until the next rate determination in 1987. If economic conditions make it implausible that any numerical rate will remain reasonable over the next seven years, then we see nothing in the statute precluding the Tribunal from adopting a reasonable mechanism for automatic rate changes in interim years. *See Permian Basin Area Rate Cases*, 390 U.S. 747, 776, 88 S.Ct. 1344, 1364, 20 L.Ed.2d 312 (1968). But, whatever the scope of the Tribunal's adjustment powers may be, the mechanism chosen must be well-determined and beyond the Tribunal's discretion, and judicial review of the reasonableness of the chosen mechanism must be available as part of the review of the Tribunal's statutory rate proceeding.

Recording Industry Association of America v. Copyright Royalty Tribunal, 662 F.2d 1, 17 (1981). The Tribunal's decision to institute a one-time, automatic adjustment of the

royalty rate based on changes in the Consumer Price Index is in full accord with this principle.

II. The Ruling of the Court Below Does Not Conflict with Precedent

AMOA asserts that the decision below conflicts with the decision of the District of Columbia Circuit in *Recording Industry* and the decision of this Court in *Permian Basin Area Rate Cases, supra*.

AMOA claims a conflict in principle with *Recording Industry* because the Tribunal in that case received in evidence what AMOA terms "substantial empirical studies of economic costs and well-being of copyright owners." AMOA Petition at p. 19.

In fact, the holding in *Recording Industry* parallels the Court decision below in finding that the statutory guidelines do not require the application of traditional cost-of-service ratemaking:

> the "fairness" of the return to a songwriter for his creative effort cannot be defined by the traditional methods of cost of service ratemaking; a broader inquiry is called for. Under these circumstances, a court owes considerable deference to the Tribunal's ultimate policy choices.

662 F.2d at 9 (footnote omitted). Contrary to AMOA's insinuation, no evidence was placed before the Tribunal in the *Recording Industry* proceeding concerning costs incurred by individual copyright owners or the individual rates of return to music writers. Thus, no conflict exists in the circuits.

The alleged conflict with *Permian Basin* is not explained at all. This Court's decision in *Permian Basin* has been discussed in Section I. *Permian Basin* does not require the utilization of any particular methodology in a rate determination. 390 U.S. at 800. As indicated, however, the rate must fall within a "zone of reasonableness" and reflect "reasoned consideration of each of the pertinent factors." The Court below carefully

considered the application of the statutory criteria by the Tribunal and concluded properly that "the Tribunal lawfully adopted a rate that falls within the zone defined by the criteria of Section 801(b)(1)." (App. 25, n. 11.)

CONCLUSION

As indicated herein, AMOA has failed to meet the threshhold requirements for the consideration of this matter by the Court. AMOA has failed to identify any issue of legal consequence or national importance. Nor has AMOA identified a judicial conflict which requires reconciliation by this Court. The decision below was not arbitrary and capricious, and was fully supported by record evidence. Accordingly, the instant petition should not be granted.

Respectfully submitted,

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